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Planned Parenthood v. Casey: From U.S. “Rights Talk” to Western European ”Responsibility Talk”

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Abstract

This Note discusses the U.S. Supreme Court’s shift from the insulating the woman in her private choice to allowing the community greater scope to encourage her to exercise her choice in a manner the community considers reflective and responsible, a shift that parallels the French and Italian abortion legislation.

PLANNED PARENTHOOD v. CASEY: FROM U.S.
"RIGHTS TALK" TO WESTERN EUROPEAN
"RESPONSIBILITY TALK"*

INTRODUCTION

U.S. legal tradition, influenced by eighteenth century discourse concerning the individual's right to life, liberty, and property,¹ developed an individualistic, rights-based legal philosophy that constitutionally protected citizens in their private lives.² The U.S. Supreme Court traditionally has interpreted the U.S. Constitution to insulate certain fundamental rights from state control.³ Generally, "taking rights seriously"⁴ in

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1. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (stating that "the right to life has come to mean the right to enjoy life—the right to be let alone"); see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting) (asserting that "[t]he makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."); cf. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 142 (1985) (asserting that individualism, pursuit of individual rights, and individual autonomy "lies at the very core of American culture").

2. LAURENCE TRIBE, *ABORTION: CLASH OF ABSOLUTES* 92 (1990) [hereinafter TRIBE, *ABORTION*]. Since the landmark cases *Meyer v. Nebraska* and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, the U.S. Supreme Court has protected certain private decisions of individuals. *Id.*; see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that right to bring up children is protected by 14th Amendment); *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (holding that right of parents to direct upbringing and education of children is protected).

3. See *Meyer*, 262 U.S. at 399 (protecting unenumerated right to marry, establish home and bring up children as fundamental); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that decisions related to child bearing and contraception are protected as fundamental); MARY ANN GLENDON, *RIGHTS TALK* 48 (1991) [hereinafter GLENDON, *RIGHTS*] (arguing that possessing rights in U.S. political culture means insulating individuals from community scrutiny and upholding the individual as "self-determining, unencumbered, individual, a being connected to others only by choice"); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 527-28 (1989) (discussing that rights-centered U.S. tradition endowed individuals with freedom to make certain choices without governmental interference); Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 81 (1990) (discussing Supreme Court's traditional protection of rights as insulating right holder from public scrutiny).

4. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 204-05 (1977). "Taking rights seriously" means protecting certain individual rights, namely fundamental rights, from community control. *Id.* Protecting rights in this manner best secures the right and provides a meaningful understanding of the right as free from inspection. *Id.*

U.S. political culture has meant that in order to preserve fundamental rights, the Court insulated individuals from community scrutiny to secure liberty.⁵

Consistent with this approach, *Roe v. Wade*⁶ established that a woman's decision to terminate her pregnancy is a constitutionally protected fundamental right that a state may not restrict during the first trimester of pregnancy.⁷ This decision is said to have exemplified the "lone rights-bearer" ethic of U.S. legal tradition which effectively glorifies the independent, self-sufficient individual by insulating the individual from state interference.⁸ In the wake of *Roe*, the U.S. public has fought bitterly over the abortion issue.⁹ The abortion debate has been

According to Professor Dworkin, "[o]ur constitutional system rests on a particular moral theory, namely, that men have moral rights against the state." *Id.* at 147. *But see* GLENDON, RIGHTS, *supra* note 3, at 4 (criticizing notion of taking rights seriously in U.S. legal tradition). In the 1960s, the Supreme Court principally focused on protecting personal liberties by incorporating the Bill of Rights as binding on the states by the Fourteenth Amendment. *Id.* at 5. The Warren Court vigorously exercised the power of judicial review as a means of protecting individual rights from interference by state governments as well as the federal government. *Id.* at 5 n.11. According to Professor Glendon, "[t]oday the bulk of the Court's constitutional work involves claims that individual rights have been violated." *Id.* For Professor Glendon, the Warren Court's expansive interpretation of many constitutional rights related to personal liberty sparked a rights revolution. *Id.* This rights revolution has consumed the collective thinking of U.S. political culture and the judiciary. *Id.* This collective thinking focuses on protecting rights, not encouraging responsibilities. *Id.* at 7. Such "rights talk" inhibits dialogue that might lead to consensus. *Id.* at 14. For Professor Glendon, rights talk, in its absoluteness, condones living in a democratic society without accepting corresponding obligations to the community. *Id.* *But see* Jane Maslow Cohen, *Comparison-Shopping in the Marketplace of Rights*, 98 *YALE L.J.* 1235, 1238 (1989) (reviewing MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1989)). The U.S. legal tradition's preoccupation with rights best secures freedoms that compromise legislation aimed at civic responsibility fail to protect. *Id.*

5. *See generally* Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 *U. CHI. L. REV.* 519 (1992).

6. 410 U.S. 113 (1973).

7. *Id.* at 163.

8. *Id.* at 113; *see* GLENDON, RIGHTS, *supra* note 3, at 47. According to Professor Glendon, the "image of the rights-bearer is an exaggerated form of a common modern ideal that has many attractive features." *Id.* U.S. legal scholarship endows individuals with certain inalienable rights such as the right to privacy. *Id.* U.S. legal tradition, however, fails to examine an individual's responsibility to the community. *Id.*

9. *See Slaying in Pensacola: A Doctor Pays With His Life In the War Over Abortion*, *N.Y. TIMES*, March 14, 1993, at E2 (discussing murder of physician who performed abortions by Michael Griffin, recent convert to anti-abortion cause); *see also* TRIBE, *ABORTION*, *supra* note 2, at 92 (discussing abortion community in U.S. legal system); Rob-

characterized as a clash of absolutes:¹⁰ a struggle between two mutually exclusive interests, the pregnant woman's right to privacy and the state's interest in the life of the fetus.¹¹ The U.S. Supreme Court's recent decisions in *Webster v. Reproductive Health Services*¹² and *Planned Parenthood v. Casey*,¹³ however, dramatically departed from the Court's previous insulation of a woman's right to choose in the first trimester.¹⁴ In *Casey*, the Court allowed greater scope for the community's interest in ensuring that the pregnant woman makes her decision thoughtfully, and hence, more responsibly.¹⁵

While the U.S. public remained entangled in debate regarding the abortion issue, two Western European countries, France and Italy, each forged a national consensus by passing compromise legislation regarding the abortion issue in the 1970s.¹⁶ The French Abortion Law of 1975¹⁷ and the Italian

ert Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U. L. REV. 978, 981 n.14 (1981) (stating that within one year after *Roe* approximately 30 constitutional amendments were introduced in Congress to overturn *Roe*); TRIBE, ABORTION, *supra* note 2, at 142-60 (discussing groups that formed to conduct either pro-choice or anti-abortion activities).

10. TRIBE, ABORTION, *supra* note 2, at 1.

11. *Id.*

12. 492 U.S. 490 (1989).

13. 112 S. Ct. 2791 (1992).

14. *Casey*, 112 S. Ct. at 2821. Justice O'Connor's joint opinion for the Court asserts "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Id.*

15. *Id.* at 2821. According to the joint opinion in *Casey*, "[t]hough the woman has a right to choose to terminate or continue her pregnancy before viability, it does not follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed." *Id.* at 2818; see Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 92 U. CHI. L. REV. 408 (1992) (arguing that state regulations aimed at encouraging women to make their decisions concerning abortion more reflectively ultimately satisfies the community's goal to encourage civic responsibility). Professor Dworkin contended that "[a] state might aim that its citizens treat decisions about abortion as matters of moral importance, that they recognize that fundamental intrinsic values are at stake in their decision, and that they decide reflectively, not out of immediate convenience but out of examined conviction." *Id.* Such regulations serve the state and its community's goal of encouraging women considering abortion to be more "responsible." *Id.*; see West, *supra* note 3, at 79. Society's effort to protect individual rights renders itself meaningless without individuals exercising responsibility. *Id.* Professor West argues that "[u]nless we also deepen our respect for the responsibilities entailed by the freedoms of a liberal society, those liberties will remain insecure." *Id.*

16. See Law No. 75-177, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, pt. I, 1978 Gazz. Uff. 3642, 1978 Lex. 871; see MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN

Abortion Law of 1978¹⁸ both carefully balanced the woman's right to choose an abortion and the community's interest in promoting life.¹⁹ The legalization of abortion in France²⁰ and in Italy²¹ demanded reflective decision-making by the pregnant woman with the help of her partner, doctors, and social workers.²² In sum, the present Italian and French abortion laws effectively de-criminalized abortion, wedded the interests of the pregnant woman's right to choose with the interests of her partner and her community, fully funded her choice in either having an abortion or giving birth, and largely settled the contested issue of abortion in those two countries.²³

This Note discusses the U.S. Supreme Court's shift from insulating the woman in her private choice to allowing the community greater scope to encourage her to exercise her choice in a manner the community considers reflective and responsible, a shift that parallels the French and Italian abortion legislation. Part I addresses the Supreme Court's jurisprudence concerning abortion. Part II examines the French and Italian community-oriented approach to resolving the abortion issue. Part III argues that the Supreme Court's recent *Webster* and *Casey* decisions represent a move towards the Western European example. This Note concludes that the Court's recent decisions incompletely mimic the Western European commu-

LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 18, 22 n.51 [hereinafter GLENDON, ABORTION] (discussing 1975 French abortion law and 1978 Italian abortion law).

17. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71.

18. Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871.

19. See Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871; see GLENDON, ABORTION, *supra* note 16, at 18-22 (1987) (discussing compromise legislation of France and Italy).

20. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71.

21. Law No. 140, pt. 1, arts. 5, 14, 1978 Gazz. Uff. 3642, 1978 Lex. 871.

22. See C. Massimo Bianca, *Il Problema Dell'Aborto: Interessi Tutelati E Scelte Sociali*, 22(I) RIVISTA DI DIRITTO CIVILE 225 (1976) (discussing counseling requirement included in 1978 Italian abortion law); see also Jacques Robert, *La Décision du Conseil Constitutionnel du 15 Janvier 1975 Sur L'interruption Volontaire de Grossesse*, 27 REV. INT. D. COMP. 56 (1975) (discussing counseling requirement included in 1975 French abortion law).

23. See Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, May 22, 1978, 1978 Gazz. Uff. 3642, 1978 Lex. 871; see GLENDON, ABORTION, *supra* note 16, at 21-22 n.51 (discussing French and Italian legislation).

nitarian ethic. Allowing U.S. legislatures to impose community values upon the woman who considers an abortion,²⁴ as the Western Europeans do, while failing to pay for her choice, resounds of hypocrisy. Legislatures should recognize that asking the woman to act responsibly in an effort to satisfy the community's values demands reciprocity from the community. Accordingly, the community must take responsibility for its own restrictions by paying for the woman's choice.

I. ABORTION IN THE UNITED STATES

In *Roe v. Wade*, decided in 1973, the U.S. Supreme Court established a woman's right to choose an abortion as a fundamental right deserving judicial protection.²⁵ Following *Roe*, the Court initially insulated the woman's decision from state regulations in the first trimester.²⁶ The Court, however, changed its approach in *Webster v. Reproductive Health Services*²⁷ by upholding state regulation of the woman's decision in the first trimester.²⁸ Moreover, the Court in *Planned Parenthood v. Casey*²⁹ approved a state regulation that required that the woman wait twenty-four hours to ponder her decision and hence presumably to be more reflective in her choice.³⁰ Against the backdrop of these decisions, the Court consistently refused to

24. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). As long as the legislation does not unduly burden the woman's ultimate decision to terminate her pregnancy before viability, the Court will uphold state legislation regulating abortion. *Id.* at 2821.

25. 410 U.S. 113 (1973). The Court held that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy. . . . This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 152-53 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

26. See *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1983) (striking down state regulations that influenced woman's decision in first trimester such as 24-hour waiting period), *overruled by* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2818 (1992) (upholding state regulations in first trimester including 24-hour waiting period); see also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 764-72 (1986) (protecting woman's decision in first trimester from state regulations and finding unconstitutional reporting requirement in first trimester), *overruled by* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2821 (1992) (holding reporting requirement in first trimester constitutional).

27. 492 U.S. 490 (1989).

28. *Id.* at 522-26.

29. 112 S. Ct. 2791 (1992).

30. *Id.* at 2825.

mandate federal and state funding of the woman's fundamental right to elect an abortion.³¹ As the Court has tapered its decisions to accommodate the community's concerns, some constitutional scholars similarly have sought compromise to get beyond the clash of absolutes.³²

A. *Historical Constitutional Protection of Abortion in the United States*

The Supreme Court in *Roe v. Wade*³³ held that a woman's decision to terminate her pregnancy was a fundamental right deserving constitutional protection by the Court.³⁴ In the years following *Roe*, the Court zealously protected the woman in the first trimester from community scrutiny regarding her abortion decision.³⁵ Beginning with *Webster v. Reproductive Health Services*,³⁶ the Court altered its previous decisions by allowing states to impose restrictions upon the woman during and after the first trimester.³⁷ Meanwhile, the Court consistently refused to recognize a governmental duty to fund a woman's decision to terminate her pregnancy.³⁸

1. Protecting a Woman's Right to Choose: The Landmark Decision of *Roe v. Wade*

The Supreme Court's decision in *Roe v. Wade*³⁹ took the

31. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (upholding federal government's denial of funding for non-medical emergency abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding government's refusal to fund abortions as constitutional).

32. TRIBE, ABORTION, *supra* note 2, at 208 (advocating compromise solutions and apparently altering his firm support of unrestricted right to terminate pregnancy); Ronald Dworkin, *The Center Holds!*, N.Y. REV. BOOKS, Aug. 13, 1992, at 29 [hereinafter Dworkin, *Center*] (supporting compromise proposals and apparently shifting his position as fundamental rights advocate).

33. 410 U.S. 113 (1973).

34. *Id.* at 159.

35. *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (holding unconstitutional regulations in first trimester), *overruled by* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2818 (1992) (upholding 24-hour waiting period restriction as constitutional).

36. 492 U.S. 490 (1989).

37. *Id.* at 519-22; see *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (holding state restrictions in first trimester constitutional unless unduly burdensome).

38. *Maher v. Roe*, 432 U.S. 464, 471 (1977); *Harris v. McRae*, 448 U.S. 297 (1980) (holding that federal government was not constitutionally required to fund abortions).

39. *Roe v. Wade*, 410 U.S. 113 (1973).

resolution of abortion restrictions away from state legislatures⁴⁰ and placed it in the hands of the judiciary.⁴¹ Appreciating the divisive nature of the abortion issue,⁴² the Court held that a woman's right to privacy⁴³ endowed her with a judicially protected fundamental right to choose an abortion.⁴⁴ The

40. *TRIBE, ABORTION, supra* note 2, at 29. State legislatures began regulating abortion in the 1800s. *Id.* Influenced by medical professionals concerned with unsafe abortions, 40 state legislatures passed criminal anti-abortion statutes. *Id.* The anti-abortion statutes permitted abortions only where a physician deemed the procedure necessary to preserve the life of the woman. *Id.* at 34. Despite the widespread practice of illegal abortions in the 1800s, states rarely prosecuted women for illegal abortions. *Id.* Illegal abortion, the third largest illegal enterprise in the 1960s, threatened lives of women due to the poor quality of such services. *Id.*; see *NANETTE DAVIS, FROM CRIME TO CHOICE: THE TRANSFORMATION OF ABORTION IN AMERICA* 98 (1985). Forcing women to seek life-threatening illegal abortions, the restrictive abortion policies discriminated most severely against women of low socio-economic status and pregnant teenagers. *Id.*; see *TRIBE, ABORTION, supra* note 2, at 47. Influenced by the fear of unsafe clandestine abortions and medical developments advancing the safety of abortion procedures, physicians and women's groups lobbied to reform the strict abortion laws in the 1960s. *See id.* In 1970, Hawaii became the first state to repeal its criminal abortion law, legalizing abortions performed before the 20th week of pregnancy. *See id.* That same year, Alaska and New York joined Hawaii by repealing their criminal abortion statutes. *See id.* at 49. Washington followed suit with a popular referendum. *See id.*

41. *Roe*, 410 U.S. at 116. The Court held that regulations limiting abortions in the first trimester "may be justified only by a compelling state interest." *Id.* at 155.

42. *Id.* Speaking for the majority of the Court, Justice Blackmun stressed the Court's "awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires." *Id.*

43. *Roe*, 410 U.S. at 153. Following a line of cases recognizing the right of personal privacy, the Court reasoned that such a privacy right, whether it be found in the Fourteenth Amendment's concept of personal liberty or in the Ninth Amendment's reservation of rights to the people, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* Laurence Tribe describes *Roe* as standing for a line of cases that affirm the value of reproductive autonomy over majoritarian control such as *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW* 932 (2d ed. 1988) [hereinafter *TRIBE, AMERICAN*]. *But see* *GLENDON, RIGHTS, supra* note 3, at 49 (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965), as first judicial protection of reproductive autonomy).

44. *Roe*, 410 U.S. at 154. The Court recognized the State's legitimate interest in the health of the mother only at the end of the first trimester. *Id.* Prior to the end of the first trimester, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." *Id.* at 163. Accordingly, the woman's decision in the first trimester is "free of interference by the State." *Id.*; see *TRIBE, AMERICAN, supra* note 43, at 924. Because the woman's right to choose an abortion ranks fundamental in the first trimester, only a compelling state interest can justify state regulation impinging upon that right. *Roe*, 410 U.S. at 163. According to Nanette Davis, *Roe's* enunciation of the rights of women to abortion hinged on the assump-

Court mandated that the decision-making authority in the first trimester remained with the woman and her physician alone and did not belong to a governmental agency or to the woman's partner or family.⁴⁵

The Court, however, declared that the pregnant woman cannot be totally isolated in her privacy.⁴⁶ The state's interest in regulating abortion to protect the woman's health became compelling only after the first trimester, and its interest in protecting the potential life of the fetus became compelling only after the second trimester.⁴⁷ Thus, *Roe's* trimester scheme effectively insulated the woman's decision from state regulation in the first trimester.⁴⁸

tion of a number of legal fictions: that rights are automatically translatable into medical and social programs; that public, legislative, and judicial support would be forthcoming (day care centers, federal funding for abortions); that physicians would support women's choices despite pressure from anti-abortion groups; and that the individual woman could demand rights in the absence of legal and medical support. DAVIS, *supra* note 40, at 98.

45. *Roe*, 410 U.S. at 163. Laurence Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 53 (1973) [hereinafter Tribe, *Foreword*]. The Court chose among "alternative allocations of decision-making authority, for the issue it faced was whether the woman and her doctor, rather than an agency or government, should have the authority to make the abortion decision at various stages of pregnancy." *Id.* at 11. *But see* TRIBE, AMERICAN, *supra* note 43, at 928 (repudiating, in part, his support of *Roe* by stating "Roe must be wrong if it rests on the premise that a state can never interfere with individual decisions with only moral justification").

46. *Roe*, 410 U.S. at 159; *see Webster v. Reproductive Health Servs.*, 492 U.S. 490, 549 (1989) (Blackmun J., dissenting). "The trimester framework simply defines and limits that right to privacy in the abortion context to accommodate, not destroy, a State's legitimate interest in protecting the health of pregnant women and in preserving potential human life." *Id.*

47. *Roe*, 410 U.S. at 163. During the first trimester, states were permitted only to require that the abortion be performed by a licensed physician. *Id.* at 165. No further restrictions peculiar to abortion were justified as "compelling" in that period. *Id.* at 163. The state's legitimate interest in the health of the pregnant woman becomes compelling at the end of the first trimester. *Id.* The state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of the pregnant woman's health. *Id.* The state's important and legitimate interest in potential life are "compelling" at viability of the fetus. *Id.* States may proscribe abortion during that period except when necessary to preserve the life or health of the mother. *Id.*

48. *Id.* at 163. Justice Rehnquist, in his dissenting opinion, decried the majority's decision by asserting that "the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter." *Id.* at 177.

2. Insulating the Woman's Decision-Making Process in the First Trimester from Community Scrutiny:
Akron and Thornburg

Underscoring the importance of a woman's personal liberty concerning abortion, the Supreme Court's initial decisions following *Roe* protected the woman's autonomy in her decision to terminate her pregnancy.⁴⁹ *Akron v. Akron Center for Reproductive Health, Inc.*⁵⁰ involved a statute regulating abortion in the first trimester.⁵¹ The statute required the physician to inform the pregnant woman that the unborn child is human life from the moment of conception, to describe the fetus, and to order a twenty-four-hour delay before the woman could obtain an abortion.⁵² Finding the regulations unconstitutional, the Court guarded a woman's fundamental right to make her decision privately by holding that only first trimester regulations that do not significantly impact on the woman's choice are constitutional.⁵³ Although acknowledging *Roe*'s assertion that the woman's fundamental right to decide is not unqualified, the Court proscribed all state regulation of abortions during the first trimester.⁵⁴ Thus, the Court in *Akron* effectively insulated a woman's private decision in the first trimester from state interference by prohibiting state restrictions upon the woman's choice and striking down a state-imposed waiting period.⁵⁵

In *Thornburgh v. American College of Obstetricians and Gynecolo-*

49. *Planned Parenthood v. Danforth*, 428 U.S. 52, 71-72 (1976). The Court in *Danforth* explained that government may not interfere with a woman's abortion decision by giving a veto over the abortion to the husband or even by conferring a veto upon a minor woman's parents. *Id.*

50. 462 U.S. 416 (1983), *overruled by* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2825 (1992) (regarding constitutionality of state-imposed 24-hour waiting periods).

51. *Id.*

52. *Id.* at 417.

53. *Id.* at 420. The statute also required physicians to perform abortions in hospitals, rather than in clinics. *Id.* Because a second-trimester abortion costs twice as much in a hospital as in a clinic and may limit a woman's ability to obtain an abortion, the Court held the hospitalization requirement unconstitutional. *Id.* Protecting the woman's right to make her decision free from the state's influence, the Court struck down the information provision. *Id.*

54. *Id.* at 421. The Court stressed that only after the first trimester may states regulate abortion. *Id.* States may protect the life of the fetus only after viability and the State may protect maternal health in the second and third trimesters. *Id.*

55. *Id.*

gists,⁵⁶ the Court protected the woman's abortion decision from a legislature's attempt to influence her choice.⁵⁷ *Thornburgh* involved a Pennsylvania statute instructing the physician to present information describing the fetus to the woman, to meet detailed reporting requirements, and to perform special procedures to determine viability.⁵⁸ Striking down the requirements,⁵⁹ the Court held that the regulations posed an unacceptable danger of deterring the woman's exercise of the fundamental right to end a pregnancy.⁶⁰ Accordingly, the Court found that the state regulations unconstitutionally subordinated the woman's constitutional right of privacy by attempting to prevent a woman from making a decision that, with her physician, is solely hers to make.⁶¹ Expanding the reasoning of *Roe*, the Court's *Thornburgh* decision exalted the woman's privacy right as a right to make the choice freely and unencumbered by any state regulation in the first trimester.⁶²

56. 476 U.S. 747 (1986), *overruled by* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2832 (1992) (regarding reporting requirements).

57. *Id.* at 772. Speaking for the Court, Justice Blackmun asserted that "States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." *Id.* at 759.

58. *Id.* at 747.

59. *Id.* at 770-71. The Court found that the Pennsylvania requirements violated a woman's constitutional right to choose an abortion. *Id.*; see *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) (holding unconstitutional Illinois statute requiring that pregnant minor wait 24 hours after notifying both parents of her abortion decision).

60. *Thornburgh*, 476 U.S. at 772, *overruled by* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2832 (1992) (regarding reporting requirements). Justice Blackmun asserted that "[i]n the years since this Court's decision in *Roe*, states and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice." *Id.*

61. *Id.*

62. *Id.* Justice Blackmun asserted for the Court that [o]ur cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits of *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental.

Id.

3. Moving a Woman's Choice into the Arena of Public Scrutiny—"Responsibility Talk" as Opposed to "Rights Talk": *Webster* and *Casey*

In 1989, the Court retreated from its previous decisions that essentially protected women from community scrutiny in the first and second trimesters.⁶³ In the *Webster* decision, a divided Court upheld a Missouri statute that provided for mandatory fetal viability testing when a doctor believed the woman to be more than twenty weeks pregnant, prohibited the use of public facilities to perform abortions, and prohibited public funding of abortion counseling.⁶⁴ Because no single opinion was endorsed by the majority of the justices,⁶⁵ Justice O'Connor's opinion was crucial in defining the Court's holding.⁶⁶ Justice O'Connor reasoned that state regulations of abortion should be upheld as long as they do not "unduly burden" a woman's choice to terminate her pregnancy.⁶⁷ *Webster* marked the end of the Court's protection of the woman's choice as insulated from state regulation in the first trimester of pregnancy.⁶⁸

63. Compare *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519-22 (1989) (upholding state regulations in first trimester) with *Thornburgh*, 476 U.S. at 772 (holding Pennsylvania regulations in first trimester unconstitutional in order to fulfill Constitution's promise "that a certain private sphere of individual liberty will be kept largely beyond the reach of government").

64. *Webster*, 492 U.S. at 522-26.

65. *Id.* at 498-99. With four votes to overturn *Roe* and four to uphold it, Justice O'Connor in 1989 became the swing vote regarding the permissibility of the state abortion legislation in *Webster*. *Id.* at 522; see Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing For an Audience of One*, 138 U. PA. L. REV. 119, 122 (1989) (arguing that fractured *Webster* decided nothing at all).

66. *Webster*, 492 U.S. at 522.

67. *Id.* at 530 (O'Connor J., concurring in part and concurring in the judgment) (quoting *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 453 (1983)).

68. *Id.* at 537-38 (Blackmun J., dissenting). Speaking on behalf of Justices Brennan and Marshall, Justice Blackmun lamented the plurality's decision to subject a woman's private decision to the "coercive and brooding influence of the State." *Id.* at 538. For Justice Blackmun, women's liberty to control their destinies are jeopardized by the "chill wind" of the plurality opinion. *Id.* at 560; see *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (upholding written parental notice requirement for minors seeking abortions); see also Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 133 (1989) ("The *Webster* case threatens to unravel not only the compromise of *Roe*, but also the compromise of women's accepting the legitimacy of law by accepting that the law is neutral and objective."); cf. James Bopp, Jr. & Richard E. Coleson, *What Does Webster Mean?*, 138 U. PA. L. REV. 157 (1989) (arguing that *Webster* de facto overruled *Roe* and its progeny).

In *Planned Parenthood v. Casey*,⁶⁹ the Court in its joint opinion confirmed its commitment to uphold state regulations aimed at making the woman's decision more thoughtful.⁷⁰ The regulations imposed a mandatory twenty-four-hour waiting period, an informed consent requirement, and parental consent and spousal notification requirements.⁷¹ While reaffirming the right of a woman to make the ultimate decision regarding whether to terminate her pregnancy, the *Casey* Court held all the Pennsylvania restrictions constitutional, except for the spousal notification requirement.⁷² The Court reasoned that the regulations did not unduly burden the pregnant woman's ultimate choice.⁷³

Rejecting *Roe*'s insulation of a woman's first trimester choice from state influence,⁷⁴ the joint opinion stated that a woman has only the right to choose an abortion without undue interference from the state.⁷⁵ The joint opinion declared that a woman has the right ultimately to decide whether to terminate her pregnancy but not to be insulated from others in so doing.⁷⁶ Thus, *Casey* seemed to mark a shift from emphasizing a virtually absolute individual fundamental right to underscoring an individual's responsibility to the community to exercise that choice reflectively.⁷⁷

The *Casey* joint opinion describes the woman's decision as an act fraught with consequences not only for the woman but also for others concerned with fetal life, including the doctors performing the operation, the spouse, and the family.⁷⁸ Departing from the sole concern of *Roe* and its progeny to protect

69. 112 S. Ct. 2791 (1992).

70. *Id.* at 2818.

71. *Id.* at 2791.

72. *Id.*

73. *Id.*

74. See *supra* notes 43-48 and accompanying text (discussing *Roe*'s insulation of women in first trimester from community scrutiny).

75. *Casey*, 112 S. Ct. at 2804. Asserting that the state may not compel or enforce one view or another concerning abortion, the joint opinion permits states to influence the woman's opinion so long as that influence does not unduly burden the woman's ultimate choice. *Id.* at 2819.

76. *Id.* at 2821.

77. See GLENDON, RIGHTS, *supra* note 3, at 59 (asserting that paradigm of lone rights-bearer prevailed in *Roe*).

78. *Casey*, 112 S. Ct. at 2807.

the woman from community scrutiny in the first trimester,⁷⁹ the joint opinion stated that the abortion decision entails respect for procreation in light of community values.⁸⁰ Because the state should be permitted to show its concern for the life of the unborn at the outset of a woman's pregnancy,⁸¹ the Court held that states may enact twenty-four-hour waiting periods to encourage the woman to be more "thoughtful" in her decision.⁸² The Court supported a state's decision to present to the woman "philosophic and social arguments" to influence her choice.⁸³ Seeking to make the woman's decision more thoughtful and to ensure that the woman consider arguments in favor of continuing her pregnancy, the joint opinion asserted that states can make laws to ensure that the woman's decision has profound and lasting meaning.⁸⁴ *Casey* appears to depart from *Roe* and its progeny by permitting states to require that the woman's choice be more thoughtful.⁸⁵

79. Compare *supra* notes 56-62 and accompanying text (discussing *Thornburgh's* protection of the woman's right to terminate her pregnancy because "[a] woman's right to make that choice freely is fundamental") with *Casey*, 112 S. Ct. at 2821 (holding that states may presently seek to dissuade woman from terminating her pregnancy in first trimester).

80. *Casey*, 112 S. Ct. at 2807.

81. *Id.* at 2816.

82. *Id.* at 2818.

83. *Id.* Accordingly, "the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Id.* (citing *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989)). But see *Casey*, 112 S. Ct. at 2842 (Stevens J., concurring in part and dissenting in part). Justice Stevens disagreed that a 24-hour waiting period would result in a more informed and thoughtful decision. *Id.* Justice Stevens contended that the presumption that prolonging a woman's decision will make her choice more informed is false. *Id.* Justice Stevens asserted that

No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.

Id.

84. *Casey*, 112 S. Ct. at 2818.

85. Compare *id.* (holding that states may encourage woman to be more thoughtful in her abortion decision in first trimester) with *Roe v. Wade*, 410 U.S. 113, 163 (1973) (state interest regarding fetus becomes compelling only in third trimester) and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986) (striking down all state regulations in first trimester), *overruled by Casey*, 112 S. Ct. at 2832 (upholding reporting requirement in first trimester).

4. Refusing to Fund Abortions: *Harris v. McRae*

For the Supreme Court, constitutionally protecting a woman's right to choose an abortion from burdensome state regulation does not imply a reciprocal state responsibility to fund a woman's choice.⁸⁶ In *Harris v. McRae*,⁸⁷ the Court examined the Hyde Amendment⁸⁸ which prohibited any use of Medicaid funds for abortion except for life-threatening situations.⁸⁹ The Court held that a woman's freedom of choice does not entail a constitutional entitlement to the financial resources to avail herself of that choice.⁹⁰ The Court proclaimed that Congress' refusal to provide funding for indigent women seeking abortions did not violate a constitutionally protected fundamental right.⁹¹ It reasoned that resolving the funding question properly lay with the legislature.⁹² Allowing the government to cut

86. See *Maier v. Roe*, 432 U.S. 464, 471 (1977) (holding that government may withhold all public funds from elective abortions even if public funds are made available to same women for expenses of childbirth); see also *Williams v. Zbaraz*, 448 U.S. 358 (1980) (holding that state government was not constitutionally required to fund abortions). The Court's denial of abortion funding followed the logic of *Dandridge v. Williams*, 397 U.S. 471 (1970), that problems posed by public welfare assistance programs were not the business of the Court. *Maier*, 432 U.S. at 480; cf. *DeShaney v. Winnebago Dep't of Social Servs.*, 489 U.S. 189 (1989) (holding that government has no affirmative duty to act even where such actions may be necessary to secure life, liberty, or property).

87. 448 U.S. 297 (1980).

88. H.R. Res. 14232, 94th Cong., 2d Sess. (1976); H.R. Res. 412, 96th Cong., 2d Sess. (1979); H.R. Res. 440, 96th Cong., 2d Sess. (1979).

89. See *McRae*, 448 U.S. at 297. The Hyde Amendment, a series of amendments to congressional appropriations bills at issue in *McRae*, limited the spending of federal funds to abortions following rape or medical necessity to save the mother's life. *Id.* This amendment stipulated that the freedom to have an abortion, like the freedom to use contraceptives or to attend private school, is not accompanied by a grant of money in the Constitution. *Id.*; see Olsen, *supra* note 68, at 106 n.7 (discussing that Hyde Amendment's funding cutoff endangered women's health because sometimes it was extended to bar funding for medically necessary abortions and in cases where woman's health but not life was threatened by pregnancy); see also *Harris*, 448 U.S. at 354 (Stevens J., dissenting) (stating that *Harris* decision "exclu[ded] benefits in 'instances where severe and long-lasting physical health damage' may result from failure to abort pregnancy").

90. *Harris*, 448 U.S. at 315. Finding the Hyde Amendment constitutional, the Court reasoned that an affirmative funding obligation for abortions cannot be found in the Due Process Clause. *Id.*

91. *Id.*

92. *Id.* But see *Harris*, 448 U.S. at 329 (1980) (Brennan J., dissenting). Speaking on behalf of Justice Marshall and Justice Blackmun, Justice Brennan emphasized that the denial of public funds plainly intruded upon the woman's constitutionally protected decision. *Id.* The denial of funds, according to Justice Brennan, coerces the

off Medicaid funding for non-therapeutic abortions,⁹³ *Harris* established that a woman's abortion decision involved a negative right, the right to be shielded from intrusive state regulations. Accordingly, the Court instructed that the fundamental right to abortion did not entail the state's affirmative duty to fund the woman's decision.⁹⁴ *Harris* ultimately saddles a woman with the duty to make a thoughtful decision without recognizing the community's affirmative duty to fund the woman's decision.⁹⁵

B. *The Current Debate: A Call to Compromise?*

The Supreme Court's recognition of a judicially protected fundamental right to choose an abortion drives public debate away from deal-making legislatures to the Court, an arena of abstract constitutional principles.⁹⁶ Scholarly debate after *Roe* examined whether principles underlying the Constitution afforded protection for the woman's abortion decision or urged leaving the question to the state legislatures.⁹⁷ The debate

indigent pregnant woman to bear her child. *Id.* Such coercion defeats the basic constitutional guarantees provided by *Roe* and the Fourteenth Amendment's Due Process Clause. *Id.*

93. DAVIS, *supra* note 40, at 223. In the wake of cutting Medicare funding for non-therapeutic abortions, many low-income women resorted to self-induced or illegal abortions. *Id.* According to the Centers for Disease Control, there were an estimated 5000 to 23,000 women obtaining illegal abortions, involving approximately 17 deaths per year, from 1975 to 1979. *Id.* at 223; see *Webster v. Reproductive Health Servs.*, 492 U.S. 531 (1989) (Blackmun J., dissenting). "Every year, many women, especially poor and minority women, would die or suffer debilitating physical trauma, all in the name of enforced morality or religious dictates or lack of compassion, as it may be." *Id.* at 588; see TRIBE, AMERICAN, *supra* note 43, at 931. For Professor Tribe, denying women funding for abortions undermines the force of *Roe's* rationale, forcing poor women back to the choice between childbirth and unsafe illegal abortions as prior to 1973. *Id.* at 933. Failing to fund abortions mirrors the extraordinary political and moral difficulty of carrying *Roe* to its logical conclusion, rather than any principled distinction concerning the role of governmental interference. *Id.* Professor Tribe believes that *Maher* and its progeny fail to adhere to the principles of *Roe*. *Id.* Politics permits decreeing that the very poor must choose between childbirth and the most hazardous clandestine abortion, while the Constitution protects the right of the wealthy to choose safe abortions even if they can afford children. *Id.* at 934. According to Professor Tribe, if *Roe* was right, then *Maher* was wrong. *Id.*

94. *Harris*, 448 U.S. at 316.

95. See West, *supra* note 3, at 84 (arguing for reproductive responsibility accompanied by state funding).

96. TRIBE, ABORTION, *supra* note 2, at 3.

97. See Tribe, *Foreword*, *supra* note 43, at 1 (stating that there is no doubt that what *Roe* decision concerns, liberty, is fit subject for judicial protection); see also Ron-

centered on the breadth of fundamental rights.⁹⁸ Scholarly dialogue, however, has since subtly shifted from talk of protecting absolute fundamental rights to talk of attaining compromise or consensus concerning this divisive issue.⁹⁹

1. The Call to Bring the Decision Back to the Legislatures

Many conservative and liberal scholars share the notion that the resolution of the abortion question properly belongs to the people and their elected representatives.¹⁰⁰ Adhering to a narrow understanding of the U.S. Constitution's Framers, conservative originalists reject constitutional protection of abortion and urge deferring the decision to legislatures.¹⁰¹ Comparative legal scholars¹⁰² and those commentators who advocate the theory that courts should reinforce representative democracy, rather than protect fundamental rights,¹⁰³ arrive at

ald Dworkin, *The Great Abortion Case*, N.Y. REV. BOOKS, June 29, 1989, at 51 [hereinafter Dworkin, *Great*] (stating that Fourteenth Amendment's Due Process Clause supports principle that people have right to decide for themselves ethical and personal issues arising from marriage and procreation). *But see* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 932 (1973) [hereinafter Ely, *Wages*] (arguing that abortion question should be left to state legislatures).

98. See Tribe, *Foreword*, *supra* note 45, at 1 (discussing principles of individual privacy underlying Fourteenth Amendment's due process clause). *But see* ROBERT BORK, *THE TEMPTING OF AMERICA* 169 (1990) (asserting that Fourteenth Amendment does not permit "inventing" fundamental right to abortion).

99. See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 407 (1992) (considering compromise as solution to bring together competing conceptions).

100. See BORK, *supra* note 98, at 169 (adhering to conservative originalist school of constitutional theory); *cf.* Ely, *Wages*, *supra* note 97, at 932 (supporting constitutional theory of reinforcing representative democracy); see Michael Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976) (supporting liberal fundamental rights theory); see also CHARLES FRIED, *ORDER AND LAW* 3 (1991) (supporting conservative fundamental rights theory).

101. See, *e.g.*, BORK, *supra* note 98, at 169.

102. See GLENDON, *ABORTION*, *supra* note 16, at 45-46 (arguing that abortion law should be formulated by compromise legislation). Comparative legal scholars compare the legal systems of countries in order to "see how [countries] have dealt with problems similar to ours." *Id.* at 1.

103. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980). The constitutional theory of reinforcing representative democracy urges the Court to act as a referee to ensure that the political process is not constricted and individuals are not denied the right to vote. *Id.* More importantly, the Court must protect powerless minorities. *Id.* at 151. But following this theory, the Court should not protect unenumerated fundamental rights such as the right of a woman to choose an abortion. *Id.* at 66.

the same conclusion with significantly different reasoning.¹⁰⁴ For these commentators, legislative resolution of the abortion issue will enable different groups of U.S. citizens to decide, through the political process, state by state, which solution best fits their needs.¹⁰⁵ Proponents of legislative control also assert that legislators are better suited than the judiciary to resolve this inherently complex issue.¹⁰⁶ Accordingly, scholars seeking to bring the abortion question to the legislatures advocate turning the question back to the people.¹⁰⁷

Advocates of legislative compromise have championed the recent Congressional effort to recapture the abortion question.¹⁰⁸ In the decade after *Roe*, approximately 500 bills relating to abortion were introduced in Congress.¹⁰⁹ Legislators of

104. Ely, *Wages*, *supra* note 99, at 923. Professor Ely argues that the Court should not challenge legislative compromise where the Constitution does not designate special protection to the values involved in the abortion question. *Id.*; see ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 28 (1975). "Should not the question . . . have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?" *Id.*; see Tribe, *Foreword*, *supra* note 45, at 32 (arguing that courts, not medical profession, have taken over responsibility to facilitate "the emergence of an alternative consensus" when environment is one of widely-perceived moral flux); TRIBE, *AMERICAN*, *supra* note 43, at 929 (defending Court's resolution of abortion issue). Professor Tribe rejects deferring the question to the legislature. *Id.* Because the right-to-life supporters who equate abortion with murder refuse to concede to a compromise that permits abortion, Professor Tribe argues that deference to politics fails to satisfy the ardent right-to-life advocate. *Id.* Moreover, Professor Tribe insists that the legislative deference argument fails to address the substantive issue, saying nothing about how a legislator within the political process, who is bound to observe the Constitution, should act. *Id.*

105. GLENDON, *ABORTION*, *supra* note 16, at 45-47.

106. *Id.*; see Dworkin, *Great*, *supra* note 97, at 49. For Professor Dworkin, allowing the abortion issue to be decided by state politics will not mean that each woman will be able to decide which solution best fits her individual convictions and needs. *Id.* In actuality, women likely will be denied that opportunity given the strength of the anti-abortion lobby. *Id.*

107. Ely, *Wages*, *supra* note 97, at 926 (arguing that abortion question belongs with state legislatures).

108. Laurence Tribe, *Write Roe Into Law*, N.Y. TIMES, July 27, 1992, at A27; cf. Ely, *Wages*, *supra* note 97, at 923 (supporting state legislative protection of woman's right to elect an abortion); see GLENDON, *ABORTION*, *supra* note 16, at 47 (advocating state legislative attempts at compromise).

109. See Legal Services Corporation Act of 1974, Pub. L. No. 93-355, § 1007(b)(8), 88 Stat. 385 (1974) (prohibiting lawyers in federally funded legal aid programs from providing legal assistance for procuring non-therapeutic abortions); see, e.g., Title IX of the Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2011(a), 95 Stat. 592 (1981) (permits grants only to programs that do not provide abortions, abortion counseling or referral); see also GLENDON, *ABORTION*, *supra* note

the 102nd Congress proposed the Freedom of Choice Act of 1991.¹¹⁰ This act would prevent states from restricting the right of a woman to terminate a pregnancy before fetal viability and at all times where necessary to protect the life or health of the woman.¹¹¹ Thus, this bill would, in effect, codify *Roe* and overrule cases narrowing *Roe*.¹¹²

Similarly, the House of Representatives and the Senate supported the Title X Pregnancy Counseling Act of 1991,¹¹³ vetoed by President Bush in September 1992.¹¹⁴ The bill included language to overturn the Bush Administration's ban on abortion counseling and referrals.¹¹⁵ The escalated effort in the House and Senate to push for immediate consideration of the Freedom of Choice Act after the *Casey* decision signals the return of the abortion question to the legislature.¹¹⁶ This time, however, the legislative activity is occurring in the federal legislature, rather than at the state level.¹¹⁷

16, at 49 (discussing the abortion bills passed by states). The majority of these proposals sought to restrict the availability of abortions, although recently the bills sought to make abortion more widely available. *Id.* In contrast, there were only 10 bills concerning abortion introduced in the 1960s. *Id.*

110. S. 25, 102d Cong., 1st Sess. (1991). The sponsors of the bill included Senators Mitchell, Cranston, Packwood, Metzenbaum, Kennedy, Adams, Bryan, Boren, Bingham, Mikulski, Pell, Simon, Akaka, Baucus, Bradley, Burdick, Chafee, Dodd, Cohen, Fowler, Glenn, Inouye, Kerrey, Kerry, Kassebaum, Harkin, Kohl, Lautenberg, Lieberman, Robb, Rockefeller, Seymour, Specter, Wellstone, and Wirth. *Id.*

111. *Id.* In reaction to the Supreme Court's modification of *Roe* and the restrictive legislation following such modification, the proposed Freedom of Choice Act mandates eliminating state regulations that "discriminate between women who are able to afford interstate and international travel and women who are not, a disproportionate number of whom belong to racial or ethnic minorities." *Id.* Ultimately, the bill aims to eliminate state restrictions that "increase the number of illegal or medically less safe abortions." *Id.*

112. *Id.*

113. S. 323, 101st Cong., 1st Sess. (1991).

114. THOMAS CARR, CONGRESSIONAL RESEARCH SERVICE, ABORTION: LEGISLATIVE CONTROL I, CRS ISSUE BRIEF 88007 (1992).

115. S. 323, 101st Cong., 1st Sess. (1991).

116. *See* Freedom of Choice Act, S. 25, 102d Cong., 1st Sess. (1991).

117. *Id.*; *see Abortion About Face*, TIME, Feb. 1, 1993, at 17 (discussing President Clinton's executive orders regarding abortion). President Clinton issued an executive order which reversed three policies of the Bush Administration regarding abortion. *Id.* First, the executive order lifted the "gag rule" on abortion counseling at federally funded family planning clinics. *Id.* Second, the order lifted the prohibition on fetal tissue research at military hospitals. *Id.* Last, the order removed restrictions on funding for overseas population control programs. *Id.*

2. Fundamental Rights Scholars Seek Compromise

Recognizing the impasse posed by the understanding of abortion as a clash of absolutes,¹¹⁸ even the most steadfast fundamental rights scholars¹¹⁹ have begun to pursue compromise.¹²⁰ The writings of renowned liberal fundamental rights scholar Ronald Dworkin epitomize such a transformation.¹²¹ Prior to *Casey*, Professor Dworkin lauded judicial insulation of a woman's choice in the first trimester.¹²² Professor Dworkin reasoned that people must be allowed to consult their own consciences, crucial to the development of their personality and sense of moral responsibility, rather than allowing society to "thrust its collective decision upon them."¹²³ Yet after *Casey*, Professor Dworkin applauded the Court's recognition of a state's interest in persuading its citizens to take decisions about abortions more responsibly.¹²⁴ According to Professor Dworkin, the community may desire that its citizens treat deci-

118. See *TRIBE, ABORTION*, *supra* note 2, at 27 (discussing moral and philosophical issues prompted by question of which right to protect, mother's right to decide or fetus' right to life).

119. *Id.*; see Dworkin, *supra* note 99, at 387 (discussing fundamental rights scholars belief that Supreme Court should pronounce and guard individual fundamental rights and enduring values drawn from the broad and abstract principles of Bill of Rights). For Professor Dworkin, the Constitution is a scheme of abstract principles that underlies the explicit text. *Id.*; see, e.g., Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 516 (1981). Dworkinian judges would guard fundamental individual rights, derived from the principles undergirding the text of the Constitution, not merely a laundry list of specific rules. *Id.* at 516-17; see William Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986) (stating that judges should protect fundamental rights).

120. Compare Tribe, *Foreword*, *supra* note 45, at 21-25 (refuting criticism of *Roe* and any potential infringement upon woman's insulated decision in first trimester) with *TRIBE, ABORTION*, *supra* note 2, at 211 (discussing compromise solutions such as better education, provision of contraception, and creation of society in which burden of raising children is lighter).

121. Compare Dworkin, *Great*, *supra* note 97, at 49-50 (stating that abortion is fundamental right of woman to decide, which should not be intruded upon or influenced by public in first trimester) with Dworkin, *Center*, *supra* note 32, at 30 (stating that state regulations encouraging women to think more seriously about their decision is one great merit of *Casey* joint opinion).

122. See Dworkin, *Great*, *supra* note 97, at 53 (arguing that "[t]he justices would do best for constitutional order and decorum, as well as principle, if they refused to take [the] bad advice" of overruling *Roe*).

123. *Id.* at 51.

124. Dworkin, *Center*, *supra* note 32, at 30. Professor Dworkin asserts that requiring women to take their decisions seriously fits the legitimate state interest in making women understand that the abortion decision involves fundamental moral principles. *Id.* In contrast to his article years earlier, Professor Dworkin would up-

sions about abortion as matters of moral importance, and that they decide reflectively, not out of immediate convenience.¹²⁵ Influenced by the moral dimensions of the abortion question, Professor Dworkin appears to have moderated his own constitutional theory in search of compromise.¹²⁶ Like the *Casey* decision itself, compromise sentiment influences even the most ardent fundamental rights scholars.¹²⁷

II. *FUSING COMMUNITY VALUES WITH A WOMAN'S RIGHT TO TERMINATE HER PREGNANCY: THE WESTERN EUROPEAN WAY*

In the 1970s, France and Italy, predominantly Roman Catholic countries, passed abortion legislation.¹²⁸ Responding to popular support for the legalization of abortion, both countries passed abortion reform laws that simultaneously decriminalized abortion and satisfied their respective community's concerns for the fetus.¹²⁹ The French and Italian legislators achieved consensus by guaranteeing to the woman funding for her abortion decision while conditioning her right to abortion upon mandatory counseling sessions, waiting periods, and discussions with her partner.¹³⁰ Both French and Italian reform abortion laws received resounding popular support.¹³¹

hold responsibility-inducing state provisions "[s]o long . . . as the state stops short of dictating to its citizens which decision they must ultimately make." *Id.*

125. Ronald Dworkin, *supra* note 99, at 408.

126. See GLENDON, *ABORTION*, *supra* note 16, at 44 (stating that even most prominent defenders of *Roe* such as Laurence Tribe and Michael Perry have recanted their earlier unquestioned approval of *Roe*).

127. *Id.* Two of *Roe*'s prominent defenders, Professor Laurence Tribe and Professor Michael Perry, modified their absolute approval of *Roe* in their recent writings. *Id.* For example, Professor Tribe initially refuted all criticism of *Roe* because the Court properly served as the ultimate arbiter regarding abortion. *See id.* Professor Tribe later revised his reasoning and asserted that the Court should participate as one important set of voices involving such a vital public issue. *See id.*

128. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, May 22, 1978, 1978 Gazz. Uff. 3642, 1978 Lex. 871.

129. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, May 22, 1978, 1978 Gazz. Uff. 3642, 1978 Lex. 871; see GLENDON, *ABORTION*, *supra* note 16, at 43 (discussing 1975 French and 1978 Italian abortion legislation).

130. GLENDON, *ABORTION*, *supra* note 16, at 19.

131. *Id.*

A. *Historical Background of Abortion in France and Italy*

In 1975, France legalized abortion after three years of heated debate in its legislature.¹³² The 1975 abortion legislation marked the end of France's nearly 200-year history of criminalizing abortion.¹³³ In 1810, the Code Napoleon prescribed five-to-ten years penal servitude to both a woman and a doctor participating in an abortion.¹³⁴ Until World War I, the French government, however, rarely prosecuted individuals for participating in abortion.¹³⁵ Indeed, the French government prosecuted fewer than thirty women annually between 1880 and 1910.¹³⁶ France, however, escalated its enforcement of its abortion laws and enacted more severe penalties for abortionists in the years following World War II.¹³⁷ Doctors caught performing abortions received one to five years in prison, together with heavy fines.¹³⁸ Public dissatisfaction with the abortion laws grew in the early 1970s.¹³⁹

Concerned with the increasing numbers of unsafe clandestine abortions,¹⁴⁰ physicians joined forces with feminist groups to protest the abortion laws.¹⁴¹ Public protest influenced legis-

132. See MALCOLM POTTS ET AL., ABORTION 399 (1977) (discussing legislators attempts to reform French law criminalizing abortion in 1973 and 1974); see also Monique Drapier, *La Loi Relative à L'Interruption Volontaire de Grossesse Dix Ans Apres: Histoire d'Un Compromis*, 101 REV. D. PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER 443, 450 (1985) (detailing Parliamentary debate in 1974 regarding liberalization of abortion laws).

133. See POTTS ET AL., *supra* note 132, at 380-81 (discussing France's nearly 200 year period of criminalizing abortion).

134. *Id.*

135. *Id.*

136. *Id.* In 1923, France introduced lesser sentences and fines for committing abortion. *Id.* Disregarding the criminal laws which were rarely enforced, individuals performed illegal abortions at a high rate. *Id.* at 381.

137. See POTTS ET AL., *supra* note 132, at 382 (discussing 1939 Code de la Famille). In 1939, France enacted the Code de la Famille which barred physicians who performed abortions from practicing medicine for five years. *Id.* Moreover, all pregnancy tests had to be registered with local governments, deterring women away from abortion. *Id.* The Vichy Government ranked abortion with crimes such as treason and sabotage. *Id.* at 383. In 1942, France executed Mme Giraud for performing 26 abortions, the last known execution for the crime of abortion. *Id.* (citing G. Fedou, *L'AVORTEMENT. DE SA REPRESSION ET DE SA PREVENTION DANS LE CODE DE LA FAMILLE DES LOIS POSTÉRIEURS* (1946)).

138. POTTS ET AL., *supra* note 132, at 398.

139. *Id.*

140. Drapier, *supra* note 132, at 481.

141. POTTS ET AL., *supra* note 132, at 397. In 1971, 300 prominent French wo-

lators to draft a reform abortion bill in 1973.¹⁴² The bill proposed the legalization of abortion where the woman's health was endangered, in cases of rape and incest, and in cases involving fetal defect.¹⁴³ The bill required the woman to wait seven days to reflect upon her decision, parental consent for women under eighteen, written application, and approval from two physicians in order to obtain an abortion.¹⁴⁴ Because the right wing of the Gaullist Party opposed the bill as too liberal and liberal parties found the bill unacceptably restrictive, the bill failed to muster enough votes for passage.¹⁴⁵ Although the 1973 reform abortion legislation never passed,¹⁴⁶ public support behind the bill set the stage for the enactment of the 1975 bill.¹⁴⁷

Similarly, Italy, after 100 years of criminalizing abortion, legalized abortion in 1978.¹⁴⁸ Prior to World War I, Italy classified abortion as a crime against the family.¹⁴⁹ Despite severe abortion penalties in force during World War II,¹⁵⁰ illegal abortions continued with casualties numbering in the

men signed a manifesto admitting that they had broken the abortion law. *Id.* In 1973, 345 French doctors signed a manifesto detailing their participation in abortions. *Id.* Alongside their manifesto, French physicians in Grenoble openly performed abortions free of charge in cooperation with the feminist organization Choice, founded by Mme Simone de Beauvoir. *Id.* at 398. In May 1973, police arrested a Grenoble doctor. *Id.* Incensed by the arrests, 3000 Grenoble citizens protested on behalf of the doctors. *Id.* Reform groups, such as the National Association for the Study of Abortion, the French Movement for Family Planning, Choice, and the Movement for Freedom of Abortion and Contraception, protested in the streets and pressured political leaders to implement change in the law. *Id.* at 397-98.

142. *Id.* at 398 (discussing the proposed Abortion Reform Bill of 1973). In a parliamentary debate, Minister of Justice M. Jean Taittinger disparaged the existing "archaic and unjust" law. *Id.* He estimated that 1000 women obtained illegal abortions daily and one woman died from those illegal abortions a day. *Id.*

143. See POTTS ET AL., *supra* note 132, at 399.

144. *See id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Italian Abortion Law of 1978, Law No. 140, pt. 1, Gazz. Uff. (May 22, 1978), 1978 Lex. 871.

149. Figà-Talamanca, *Italy*, in *INTERNATIONAL HANDBOOK ON ABORTION* 279 (Paul Sachdev ed., 1988) [hereinafter Figà-Talamanca]. The fascist regime changed the law's emphasis to a crime against the Italian "race." *Id.*

150. POTTS ET AL., *supra* note 132, at 382. A doctor performing an abortion could receive two to 12 years in prison while a woman could be imprisoned for one to five years. *Id.* The police, however, rarely enforced the law. *Id.*

thousands annually.¹⁵¹ Influenced by French popular support for the legalization of abortion,¹⁵² Italian feminist groups,¹⁵³ doctors, and parliamentarians sought to bring the issue to a popular vote by collecting votes for a referendum on the law.¹⁵⁴ Seeking to avoid the referendum, Parliament successfully modified the law by passing the compromise legislation of 1978.¹⁵⁵

B. Current Abortion Law in France and Italy

Responding to heated demands from physicians and women's groups, French legislators passed reform abortion legislation in 1975.¹⁵⁶ The legislation established the right of a woman in distress ("*détresse*") to obtain an abortion,¹⁵⁷ accompanied in 1982 by legislation granting complete funding for her abortion.¹⁵⁸ The abortion law, however, commanded that the woman consider the interests of her community and family in making her decision.¹⁵⁹ Italy passed a similar abortion law in 1978, also providing full payment for the woman's abortion

151. *Id.*

152. Figà-Talamanca, *supra* note 149, at 281. Covered by the Italian media, French public debate on the issue served as a model and guide for the burgeoning feminist groups in Italy. *Id.*

153. *Id.* at 281 (citing V. Barrouso, *Abortion in Italy*, ILA PALMA POLERMO (1982)). In 1973, hundreds of prominent women publicly confessed that they had obtained abortions. *Id.* Groups of women organized public protests, sit-ins, hunger strikes, and operated free-standing abortion clinics. *Id.*

154. POTTS ET AL., *supra* note 132, at 401-02 (citing *What Italians Think*, PANORAMA, Aug. 1974, at 57-58. Reform groups successfully collected half a million signatures as required by the Italian Constitution to initiate a public referendum. POTTS ET AL., *supra* note 132, at 402. Conducted in 1974, a popular opinion poll indicated that 75% of Italians favored legalizing abortion. *Id.* at 401 (citing *What Italians Think*, *supra*, at 57-58).

155. Italian Abortion Law of 1978, Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, Lex. 871 (May 22, 1978); see Sari Gilbert, *Italy's Parliament Approves Liberal Abortion Law: Liberal Abortion Bill Passes in Italy*, WASH. POST, May 19, 1978, at A1. Parliament achieved success only after two failed proposals in 1976 and 1977. *Id.* The fight over abortion legislation threatened Italy's political stability for the three years preceding the 1978 compromise bill. *Id.*

156. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71.

157. Law No. 75-17, Jan. 18, 1975, art. L. 162-1, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71.

158. Law No. 82-1172 of Dec. 31, 1982, 1983 J.O. 13, 1983 D.S.L. 86.

159. Law No. 75-17, Jan. 18, 1975, art. L. 162-4, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71.

decision.¹⁶⁰

1. Compromise Abortion Legislation in France

The French Abortion Law of 1975, guided by the general principles of respect for every individual from the commencement of life,¹⁶¹ makes abortion available, up to the tenth week of pregnancy, to any woman whose condition places her in distress.¹⁶² Providing that the woman individually determine whether she is in distress, the statute prescribes several procedures designed to make the pregnant woman aware of, and able to choose, alternatives to abortion.¹⁶³ First, the physician attending to the woman in her initial request to terminate her pregnancy must supply her with a brochure, detailing the law's provision that the woman must be in distress.¹⁶⁴ Second, the pregnant woman and her partner must meet with a government-approved counseling service.¹⁶⁵ Last, the woman must

160. Law No. 140, pt. I, 1978 Gazz. Uff. 3642, 1978 Lex. 871.

161. Law No. 75-17, Jan. 18, 1975, art. 1, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71. "The law guarantees the respect of every human being from the commencement of life." *Id.*

162. Law No. 75-17, Jan. 18, 1975, art. L. 162-1, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Drapier, *supra* note 132, at 450. Requiring that the woman deem herself in "*détresse*" (distress) gave moral and philosophical value to the woman's decision. *Id.* Politicians intended the ambiguous nature of "*détresse*" to allow women to evaluate their individual stress and needs. *Id.* Moreover, lawmakers found it more reassuring that the decision to abort involved "*un drame*" (a drama or momentous decision). *Id.*

163. Law No. 75-17, Jan. 18, 1975, art. L. 162-3, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; see GLENDON, ABORTION, *supra* note 16, at 16 (explaining art. L. 162-3).

164. Law No. 75-17, Jan. 18, 1975, art. L. 162-3, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71. Moreover, the brochure must contain information about the public benefits and programs that are guaranteed to mothers and children, the possibilities of adoption, as well as providing a list of organizations capable of giving assistance. Law No. 75-17, Jan. 18, 1975, art. L. 162-3 (2)(a)-(d), 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71.

165. Law No. 75-17, Jan. 18, 1975, art. L. 162-4, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71. The provision aims at making sure the woman understands the seriousness of the matter. GLENDON, ABORTION, *supra* note 16, at 156. The counselors give the woman advice "especially with a view toward enabling her to keep her child." Law No. 75-17, Jan. 17, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; see Michel Hardouin, *Grossesse et Liberté de la Femme*, 9-10 D. SOCIAL 287, 301-06 (Sept.-Oct. 1977) (noting that discussions are particularly oriented toward dissuading women from terminating their pregnancy).

wait one week after meeting with the physician before having an abortion.¹⁶⁶ The legislature wanted the woman to have time to weigh all of the elements of her decision in light of her discussions with the doctor, the social agency, and her partner.¹⁶⁷ After the tenth week of pregnancy, the French law permits only therapeutic abortions, necessary to prevent danger to the woman's life or in cases of severe fetal deformity.¹⁶⁸ In 1979, French lawmakers added language to the legislation to ensure the state's active promotion of respect for life, underscoring the importance of society's responsibility for children.¹⁶⁹

Abortions are fully paid for by the French state.¹⁷⁰ Although the 1975 legislation failed to address whether women should be reimbursed for their abortions by Social Security, proponents of abortion funding successfully achieved their goals in 1982.¹⁷¹ The 1982 legislators reasoned that since the state considers abortion an "objective right" ("*droit objective*"), society must reimburse the medical bill.¹⁷² Abortion funding in France follows the French government's deeply entrenched tradition of providing social services as an affirmative constitutional right.¹⁷³

166. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3-4, 1980 D.S.L. 71.

167. Drapier, *supra* note 132, at 454.

168. Law No. 75-17, Jan. 18, 1975, art. L. 162-12, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 4, 1980 D.S.L. 71.

169. Law No. 75-17, Jan. 18, 1975, art. 1, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, art. 1, 1980 J.O. 4, 1980 D.S.L. 71. The amended legislation demanded that a "provision of information on the problems of life . . . education towards responsibility, the acceptance of the child in society, and family-oriented policy are national obligations." *Id.*

170. Law No. 82-1172, Dec. 31, 1982, art. L 283, 1983 J.O. 15, 1983 D.S.L. 86. The law of December 31, 1982 charges all costs of an abortion to the state. *Id.*

171. Law No. 82-1172, Dec. 31, 1982, art. L-283, 1983 J.O. 15, 1983 D.S.L. 86; see Drapier, *supra* note 132, at 464 (discussing full funding provided by 1982 French law).

172. Law No. 82-1172, Dec. 31, 1982, art. L-283, 1983 J.O. 15, 1983 D.S.L. 86.

173. See David Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 867 (1986) (discussing French notion of affirmative rights in comparison with U.S. legal tradition's emphasis on negative rights). In the 1791 Constitution, France acknowledged the state's affirmative duty to provide a system of public assistance aimed at providing "nourishment, suitable clothing, and the opportunity for a healthy life" to all. *Id.* at 867 (quoting BARON DE MONTESQUIEU, *ESPRIT DES LOIS* (V. Pritchard ed. 1898)). The French Constitution of 1946 provides that "[t]he Nation ensures to the individual and the family the conditions necessary to their develop-

Legislators who opposed the 1975 abortion bill presented the new law to the Constitutional Council¹⁷⁴ for review.¹⁷⁵ The Constitutional Council held that the 1975 law affirmed notions of liberty and did not violate constitutional principles.¹⁷⁶ Pointing to the interest of the community and the liberty of the woman, the Council noted that the preservation of the woman's liberty must be joined with the concern of the community for the woman.¹⁷⁷ The Council concluded that it was neither possible nor reasonable to find that a pregnant woman

ment" and "guarantees to all . . . protection of health [and] material security." *Id.* at 865 (quoting CONST. pmb. (Fr. 1946)).

174. James Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431 (1972). The Constitutional Council is the highest court of review in France. *Id.* at 431. Until 1971, the Constitutional Council never invalidated an act of Parliament on the grounds that it infringes a constitutionally protected right of a citizen. *Id.* at 431-32. Striking down an act of Parliament in such a manner was foreign to French constitutional tradition. *Id.* at 431; see MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 577 (1979) (translating Decision of July 16, 1971, Con. const., Fr., July 17, 1971, J.O. 7114 (1971)). The Constitutional Council changed the role of the Council by declaring itself the ultimate protector of individual liberties in its July 16, 1971 decision. *Id.*; see Decision of January 18, 1985, Con. const., Fr., 1986 D.S. Jur. 425 (1985) (holding that "it is up to the legislator to effect the necessary balance between the respect of liberties and preservation of the public order without which the exercise of these liberties could not be assured."); Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265, 316 (1988) (discussing Constitutional Council's January 18, 1985 decision).

175. Decision of Jan. 15, 1975, D.S. Jur. 529; J.O. Jan. 16, 1975, at 671.

176. Decision of Jan. 15, 1975, D.S. Jur. 529; J.O. Jan. 16, 1975, at 671; see Robert, *supra* note 22, at 874-81. Those who opposed the 1975 abortion law pointed to three texts which the bill violated: the Preamble of the Constitution of 1858 which deems all human beings as possessing inalienable and sacred rights; the Preamble of the 1946 Constitution which guarantees protection of the health of all mothers and their children; and Article 2 of the European Convention Safeguarding the Rights of Man. *Id.* at 874-75. The opposition declared that a fetus has the same rights as a newly born child. *Id.* at 876. Proponents of the new law responded that no constitutional text explicitly guarantees state protection to the fetus. *Id.* For the Council, the law is a law of liberty. *Id.* at 888. Because it is a law of liberty, it must be subject to limitation "*car il n'existe point de vraie liberté sans barrière de la loi*" (for there exists no true liberty without the barrier of law). *Id.* at 888 (translation by Note author). The Council's decision reflects French philosopher Jean Jacques Rousseau's notion that there is no freedom for man without social order. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 52 (1955). French political philosophy embraces majoritarian rule. *Id.*; compare generally with JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* (1963) (arguing American individualistic, right-bearer philosophy that role of government is sole protector of individual's right to property).

177. Decision of Jan. 15, 1975, D.S. Jur. 529; J.O. Jan. 16, 1975, at 671; see Robert, *supra* note 22, at 884 (discussing Constitutional Council's January 15, 1975 decision regarding the 1975 abortion law).

has no rights over the embryo that she carries.¹⁷⁸ To hold that a woman has no such rights would attenuate the true liberty of the woman who must be able to depend on the community to support her decision.¹⁷⁹ French legal scholar Monique Drapier argued that no fundamental right exists that authorizes the mother to do what she likes with her body.¹⁸⁰ For the Council, the interests of the community and the pregnant woman together promote liberty.¹⁸¹

2. Italy Joins a Woman's Freedom to Terminate Her Pregnancy with Societal Concerns

The Italian abortion law of 1978,¹⁸² a compromise between opponents and proponents of abortion rights, begins with a declaration of the state's commitment to protect human life from its inception.¹⁸³ During the first ninety days of pregnancy, a woman may request an abortion where the pregnancy would seriously endanger her physical and mental health, in light of her state of health, economic, social, or family circumstances, and the circumstances in which conception occurred.¹⁸⁴ By allowing the woman to decide if she is endangered, the abortion law guarantees her the right to conscious and responsible procreation, while recognizing the value of motherhood.¹⁸⁵

Like the French statute, the Italian law imposes mandatory counseling sessions and a legally prescribed seven-day period of reflection before terminating the pregnancy.¹⁸⁶ The coun-

178. Decision of January 15, 1975, D.S. Jur. 529; J.O. Jan. 16, 1975, at 671.

179. Decision of January 15, 1975, D.S. Jur. 529; J.O. Jan. 16, 1975, at 671; see Robert, *supra* note 22, at 889 (discussing Constitutional Council's January 15, 1975 decision).

180. Drapier, *supra* note 132, at 477.

181. Decision of January 15, 1975, D.S. Jur. 529; J.O. Jan. 16, 1975, at 671; see Drapier, *supra* note 132, at 477 (discussing Constitutional Council decision of January 15, 1975).

182. Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871.

183. Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871. The Italian Abortion Law of 1978 proclaims the state's commitment to "protect human life from its inception." *Id.*; see GLENDON, ABORTION, *supra* note 16, at 163 n.51 (translating Article 1 of 1978 Italian abortion law).

184. Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871.

185. Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871; see Figà-Talamanca, *supra* note 149, at 28-82 (discussing 1978 Italian abortion law).

186. Law No. 140, pt. 1, art. 5, 1978 Gazz. Uff. 3642, 1978 Lex. 871; see GLEN-

seling sessions must be designed with respect for the dignity and personal feelings of the woman.¹⁸⁷ As in the French law, the Italian law requires the woman and her partner to consult with a social counselor regarding the woman's decision to terminate her pregnancy.¹⁸⁸ Including a role for the father into the woman's decision convinced many Senators to vote for the bill.¹⁸⁹ As part of the national health service, the government pays for the woman's abortion.¹⁹⁰

Italy initially encountered protest from the Catholic Church over the new law.¹⁹¹ Yet, a popular referendum in 1981 defeated attempts to change the law.¹⁹² Italians voted to affirm the abortion law by a two-to-one margin.¹⁹³ Since 1981, no attempts have been made to alter the 1978 abortion law.¹⁹⁴

III. WESTERN EUROPEAN "RESPONSIBILITY TALK" VERSUS U.S. "RIGHTS TALK": CASEY HEADS IN THE WESTERN EUROPEAN DIRECTION

Two Western European countries, France and Italy, forged a national consensus on the abortion issue by wedding their respective community's interests with the woman's right to terminate her pregnancy.¹⁹⁵ Providing funding for the woman's choice, both countries require that the woman deliberate concerning her decision with her partner, family, and fam-

DON, ABORTION, *supra* note 16, at 164 n.51 (translating Article 5 of Italian abortion law).

187. Law No. 140, pt. 1, arts. 5, 14, 1978 Gazz. Uff. 3642, 1978 Lex. 871.

188. Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871; *see* Gilbert, *supra* note 155, at A1 (discussing 1978 abortion law's consultation requirement).

189. Gilbert, *supra* note 155, at A1. The 1976 abortion bill failed in part because several Senators objected to the omission of the father's role. *Id.*

190. Figà-Talamanca, *supra* note 149, at 282.

191. Sari Gilbert, *Anti-Abortion Pressure by Vatican Seen: Move to Thwart Italy's Law*, WASH. POST, June 19, 1978, at A16. Fierce protest from the church followed the passing of the 1978 abortion bill. *Id.* Pope Paul VI threatened excommunication for doctors performing abortions and right to life groups protested at hospitals that performed abortions. *Id.* Pope Paul VI called upon high-ranking bishops to recruit doctors to conscientiously object to performing abortions. *Id.*

192. Figà-Talamanca, *supra* note 149, at 282.

193. *Italy: Abortion Lives*, ECONOMIST, May 23, 1981, at 60.

194. *Id.*

195. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871; *see* GLENDON, ABORTION, *supra* note 16, at 43 (discussing compromise legislation in France and Italy).

ily planning counselors.¹⁹⁶ In recent U.S. Supreme Court decisions, most prominently in *Planned Parenthood v. Casey*,¹⁹⁷ abortion law in the United States appears to be moving in the Western European direction.¹⁹⁸ The Court in *Casey* permitted state legislatures to require that a woman consider the community's concerns in making her decision.¹⁹⁹ Unlike the Western European example, however, the Court and states have refused to recognize the reciprocal responsibility of the community to pay for the abortion.²⁰⁰

A. *Western European Responsibility Ethic*

As shown above, France's 1975 abortion law protects the woman's decision concerning the termination of her pregnancy by fusing the community's interests with the woman's right to control her body.²⁰¹ The 1975 French legislation joins freedom with responsibility in an effort to protect the woman's liberty.²⁰² By requiring the woman to wait and to participate in

196. Law No. 75-17, Jan. 18, 1975, article L. 162-4, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871.

197. 112 S. Ct. 2791 (1992).

198. See GLENDON, ABORTION, *supra* note 16, at 52 (urging United States to follow Western European example regarding abortion).

199. *Casey*, 112 S. Ct. at 2821. The Court asserted that

[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. . . . [A] state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.

Id.

200. See *Harris v. McRae*, 448 U.S. 297, 298 (1980) (upholding constitutionality of federal legislation denying funding for abortions); see also *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989) (upholding as constitutional state refusal to fund abortion counseling).

201. Hardouin, *supra* note 165, at 299; see *supra* notes 161-73 and accompanying text (discussing French abortion legislation); see also Drapier, *supra* note 132, at 481. According to French legal scholar Monique Drapier, "[w]hat is essential to understand is that the life of the embryo is not the question, but the rights of the mother, the father, the public order, the society organized with its deficiencies, its focus, and its moral values." *Id.*

202. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; see Hardouin, *supra* note 165, at 287. French society perceives pregnancy as a state of weakness. *Id.* Witnessing the woman in such a state, society seeks to protect the woman. *Id.* At the same time, the woman's state of weakness, pregnancy, stirs the state to endow her with

counseling sessions with her partner, the law aims to ensure that the woman thinks seriously about her decision.²⁰³ The woman in France, however, understands that the community will support and pay for her ultimate decision.²⁰⁴

Prevailing French thought underscores the notion that separating the woman from her community when she makes the serious decision of abortion ultimately dilutes her freedom.²⁰⁵ Disassociating the woman from society in her decision encourages the woman's partner and society to flee their responsibility to protect the woman, a valued partner and member of the community.²⁰⁶ Illustrated by the law's mandate that the woman discuss the issue with her partner, a social counselor, and her physician, the French abortion law inextricably links the woman's free choice with her responsibility to society, as well as society's responsibility to the woman.²⁰⁷

Similarly, the Italian abortion law of 1978 predicates a woman's liberty to terminate her pregnancy upon her making the decision with reflection.²⁰⁸ Italian legal scholars explain that understanding abortion as a private affair contradicts Italian society's communitarian ethic.²⁰⁹ Like the French decision to provide the pregnant woman with financial freedom in her choice,²¹⁰ Italian society fulfills its reciprocal obligation to support the woman financially in her decision, either in carrying the fetus to term or in terminating the pregnancy.²¹¹

freedom to decide whether to terminate her pregnancy. *Id.* at 299. The French law seeks to satisfy both goals. *Id.*

203. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; see GLENDON, ABORTION, *supra* note 16, at 16 (noting that 1975 French abortion law encourages woman to think reflectively about her decision regarding termination of her pregnancy).

204. GLENDON, ABORTION, *supra* note 16, at 18.

205. Hardouin, *supra* note 165, at 299.

206. *Id.*

207. Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71.

208. Law No. 140, May 22, 1978, 1978 Gazz. Uff. 3642, 1978 Lex. 871; see Bianca, *supra* note 22, at 235 (discussing 1978 Italian abortion law).

209. Bianca, *supra* note 22, at 225. The Italian abortion law establishes a woman's rights within a body of law designed to protect the supremacy of the community. *Id.* As such, Italians share in the responsibilities that accompany the community's support of its citizens. *Id.*

210. Law No. 82-1172, Dec. 31, 1982, art. L-283, 1983 J.O. 15, 1983 D.S.L. 86.

211. Law No. 140, May 22, 1978, 1978 Gazz. Uff. 3642, 1978 Lex. 871; see Bianca, *supra* note 22, at 232 (discussing 1978 Italian abortion law).

Taking responsibility seriously,²¹² embraced by the Italian and French abortion legislation, upholds the woman's freedom as co-extensive with society's goals and responsibilities.²¹³ Abortion compromise legislation in both France and Italy effectively codifies their shared ethic of demanding reciprocal responsibility from the community and the individual.²¹⁴ The Western European experience, exemplified by France and Italy, urges joining the woman to the community regarding abortion, not leaving her alone as a "lone rights-bearer."²¹⁵

B. Abortion in the United States Moves from the Traditional American "Lone Rights-Bearer" Approach to "Responsibility Talk"

Unlike French and Italian legislation, the Court in *Roe v. Wade* insulated the woman from community scrutiny in the first trimester of her pregnancy.²¹⁶ The *Roe* decision, followed by *Akron* and *Thornburgh*, championed the isolation of the woman from state regulation as fundamental to securing the woman's right to terminate her pregnancy.²¹⁷ The Supreme Court's recent decisions, however, upheld state regulations that require the woman to reflect upon her decision in light of the society's interests.²¹⁸ Imposing societal concerns upon the woman in the first trimester signals a move in the Western European direction.²¹⁹ Federal and state legislatures in the United States,

212. West, *supra* note 3, at 79. "Taking responsibility seriously" means that the zealous protection of individual rights in liberal societies fails to protect those rights adequately. *Id.* Only by refocusing society towards shared responsibilities of each individual member to the collective whole and "taking responsibility seriously" can the freedoms of a liberal society be best secured. *Id.* at 85.

213. GLENDON, ABORTION, *supra* note 16, at 53.

214. *Id.* at 19-23.

215. See *supra* note 8 and accompanying text (discussing Professor Glendon's "lone rights-bearer" thesis).

216. 410 U.S. 113 (1973).

217. *Id.* at 163; see *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 450 (1983) (protecting women from community scrutiny in first trimester by striking down waiting periods), *overruled by* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2816 (1992) (upholding 24-hour waiting period in first trimester); see also *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986) (holding unconstitutional regulations in first trimester, including reporting requirement), *overruled by Casey*, 112 S. Ct. at 2821 (holding reporting requirements in first trimester constitutional).

218. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding state regulations in first trimester); see also *Casey*, 112 S. Ct. at 2821 (upholding 24-hour waiting period and other regulations in first trimester).

219. See GLENDON, ABORTION, *supra* note 16, at 52-55 (discussing French and

however, refuse to fund the woman's choice, and so have not fully emulated the Western European experience.²²⁰

1. The U.S. Government's Amicus Curiae Brief in *Webster* Praises the Western European Example Yet Fails to Adhere to the Fundamental Principles Underlying the Western European Legislation

Roe and its progeny before *Webster v. Reproductive Health Services*²²¹ affirmed the right of the woman in the first trimester to elect an abortion, guided only by her physician and not by the state, the woman's parents, or her spouse.²²² The Court judicially isolated the woman from public scrutiny in her choice.²²³ Before the Court's decision in *Webster*, such isolation affirmed the woman's fundamental right to control her body while liberating her choice from societal influence.²²⁴ Such isolation, Professor Glendon has argued, illustrates the "lone rights-bearer" thesis in American law.²²⁵ The Court refused to infringe upon the woman's right to privacy in the first trimester and upheld the right of individual autonomy as virtually absolute.²²⁶ Isolating the woman in the first trimester from state regulation provided protection to the lone rights of the woman, to the exclusion of societal interests.²²⁷ In that

Italian compromise abortion legislation aimed to reconcile woman's liberty interest with community's concerns).

220. GLENDON, ABORTION, *supra* note 16, at 53-54.

221. *Webster*, 492 U.S. at 522.

222. *Planned Parenthood v. Danforth*, 428 U.S. 52, 72-75 (1976). The Court in *Danforth* rejected parental and spousal vetoes of a woman's decision to abort. *Id.* at 72; see *supra* notes 63-68 and accompanying text (discussing Court's protection of woman from state regulation in first trimester prior to *Webster*).

223. *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), *overruled* by *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2825 (1992) (regarding constitutionality of 24-hour mandatory waiting periods) (holding unconstitutional restrictions in first trimester); see *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986) (holding woman's right to terminate her pregnancy as unencumbered by state regulation in first trimester), *overruled* by *Casey*, 112 S. Ct. at 2832 (regarding reporting requirements).

224. See *Thornburgh*, 476 U.S. at 772 (striking down state regulations in first trimester); see *supra* notes 56-62 and accompanying text (discussing *Thornburgh's* insulation of woman in first trimester from community scrutiny).

225. GLENDON, RIGHTS, *supra* note 3, at 59; see *supra* note 8 and accompanying text (discussing U.S. lone rights-bearer legal tradition).

226. See GLENDON, RIGHTS, *supra* note 3, at 58-59.

227. See *id.* at 59 (arguing that lone rights-bearer paradigm prevailed in cases after *Roe*).

sense it reflected, in Justice Brandeis's immortal words, "the right to be let alone."²²⁸

The Western European example served as a model and guide for the U.S. government's amicus brief for the appellant in *Webster*.²²⁹ The U.S. government defended the community's interest in making the woman's decision more informed and responsive to the community's concern for the fetus.²³⁰ The U.S. government's briefs enthusiastically advanced the thesis that European abortion laws are significantly different from and superior to U.S. laws.²³¹ The U.S. government, however, ignored the dual dimensions of the Western European experience, that the woman's responsibility to the community is integrally bound to the community's responsibility to pay for the woman's decision.²³² Precisely because those countries' laws require the woman to act more responsively to the community's interests, those countries' laws guarantee full payment of the woman's choice in abortion or in childbirth.²³³

Both the U.S. government's amicus brief and Justice O'Connor's concurring opinion in *Webster* mandated that a woman's choice be more responsible but failed to support federal funding for abortion counseling.²³⁴ In *Webster*, the Court upheld state legislation denying funding for abortion counseling.²³⁵ The Court in *Webster* failed to understand that denying

228. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

229. See Amicus Curiae Brief of the United States in Support of Appellant at 23-24, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (lauding Western European compromise legislation that joined community concerns with woman's right to terminate her pregnancy).

230. *Id.*

231. *Id.* But see Brief of Amici Curiae International Women's Health Organizations in Support of Appellees at 2-20, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (rebutting Professor Glendon's thesis).

232. Olsen, *supra* note 68, at 116.

233. Law No. 82-1172, Jan. 1, 1983, art. L. 283, 1983 J.O. 3, 1983 D.S.L. 86; Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871; see GLENDON, ABORTION, *supra* note 16, at 54-57 (discussing French and Italian funding of abortion).

234. See Amicus Curiae Brief of the United States in Support of Appellant, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 523-530 (1989) (O'Connor J., concurring in part and concurring in the judgment) (supporting Court's previous holdings regarding constitutionality of state and federal legislation denying funding for abortions and upholding increase in cost of abortions related to viability testing as constitutional).

235. *Webster*, 492 U.S. at 523.

federal funding for abortion counseling impedes an indigent woman's constitutional right to terminate her pregnancy as mandated by *Roe*.²³⁶ Yet, as the prevailing jurisprudence of the Supreme Court illustrates, only privileged women in the United States fully enjoy the right to choose an abortion.²³⁷

2. *Casey* Moves in the Western European Direction

The Court in *Casey* allowed society to force its concern for more thoughtful decision-making upon the woman in the first trimester.²³⁸ Justice O'Connor asserted in *Casey* that the woman has the right only to make the ultimate decision, but does not have a right to be insulated from all others in so doing.²³⁹ This assertion signals an acceptance of something like the Western European concept of wedding community values with the woman's choice. The Court in *Casey* approved the imposition of a more reflective choice upon the woman by upholding the twenty-four hour waiting period.²⁴⁰ Moreover, the Court allowed the presentation of community-oriented arguments to the woman before she makes her decision.²⁴¹ Thus, the Court in *Casey* effectively redirected U.S. abortion jurisprudence in the Western European direction.²⁴²

Mandating that women be more thoughtful in their decision-making²⁴³ and take reproductive responsibilities and free-

236. *Id.* at 522.

237. See generally *Harris v. McRae*, 448 U.S. 297 (1980) (holding federal refusal to fund abortions constitutional); see *supra* notes 86-95 and accompanying text (discussing Court's refusal to create affirmative duty for states to provide funding); see Olsen, *supra* note 68, at 116 (discussing Hyde Amendment's effective denial of poor women's right to terminate pregnancy); see also Laurence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 *HARV. L. REV.* 330, 337 (1985) (noting that government's choice in denying funding for non-therapeutic abortions ultimately sacrifices poor woman's freedom to terminate her pregnancy).

238. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2825 (1992).

239. *Id.* at 2821.

240. *Id.* at 2816.

241. *Id.*; see *supra* notes 69-85 and accompanying text (discussing *Casey* decision).

242. See *Casey*, 112 S. Ct. at 2821 (upholding state regulations aimed to persuade women to be more thoughtful in their decisions concerning abortion and elect child-birth over abortion).

243. Compare *id.* at 2826 with Jane Maslow Cohen, *Comparison-Shopping in the Marketplace of Rights*, 98 *YALE L.J.* 1235, 1253 (1989) (predicating woman's right to abortion upon waiting period or counseling sessions with social worker fetters woman's autonomy); cf. TRIBE, *ABORTION*, *supra* note 2, at 203. "What women who would take lightly the decision to have an abortion will rethink it more seriously simply because a

dom seriously,²⁴⁴ as the Court in *Casey* demands, also should entail making the community accountable for such regulations.²⁴⁵ Redirecting society toward shared responsibilities means that society must also share in the collective responsibility such as providing meaningful material assistance to aid a woman in her choice to bear to term or abort the fetus.²⁴⁶ Faithful adherence to the Western European example would mean accompanying the regulations aimed at encouraging more thoughtful decisions with funding for the woman's ultimate decision to terminate her pregnancy or to keep the child. Providing meaningful material assistance to the woman should include paying for the woman's expenses that accompany terminating a pregnancy or bearing the child. Such assistance should include travel costs and days spent away from her job, counseling regarding her decision, and helping the woman bear and support a child, should she forgo terminating her pregnancy.²⁴⁷ Material assistance, however, should not be limited to the above-mentioned suggestions. Furthermore, state legislatures should implement programs designed to prevent

law says she has to wait a day before having the procedure?" *Id.*; see Tribe, *Foreword*, *supra* note 45, at 37. According to Professor Tribe

any notion that the doctor, or some other disinterested expert, is in a better position than the woman and her family, by virtue of such disinterest and expertise, not only to provide advice and consultation but also to make the final choice with respect to whether the family should have and raise a child, amounts to nothing more than a denial of the underlying first amendment premise that groups should ordinarily have the role of making their ultimate associational choices, informed and perhaps influenced, but not forced by others.

Id.

244. West, *supra* note 3, at 85. *But see* Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 171 (1992) (arguing that taking rights seriously may require insulation of right holder to secure right).

245. *Id.*; see GLENDON, ABORTION, *supra* note 16, at 53. "The European experience leads one to wonder why pregnant women in the United States should be asked to make significant sacrifices [whether they abort or bear children], if absent fathers and the community as a whole are not asked to sacrifice too." *Id.*; see Tribe, *Foreword*, *supra* note 45, at 45. "Having concluded that government cannot usurp the woman's role of personal decision with respect to early abortion, one might ultimately be able to conclude that government must assume, directly or indirectly, the affirmative role of providing access to the means of preventing unwanted pregnancy and or terminating it if it occurs." *Id.*

246. Tribe, *Foreword*, *supra* note 45, at 45.

247. See Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871.

unwanted pregnancies such as sex education programs and providing condoms at schools.²⁴⁸

The Court in *Casey* did not explicitly address whether the state regulations carry communal responsibilities to the woman.²⁴⁹ The government should support the woman's abortion decision by equally promoting both the woman's and the state's interests.²⁵⁰ Moreover, state legislatures should ensure that clinics and hospitals provide the safest procedures available, counsel the woman in her choice, and help her pay for it.

Casey seemingly moves beyond the Court's traditional approach of protecting individual rights as negative rights to be free from government restrictions.²⁵¹ The "lone rights-bearer" is no longer allowed to exercise a "right to be left alone."²⁵² Understanding privacy as a negative right means telling states what not to do, rather than creating duties for states.²⁵³ The previous treatment of privacy in the U.S. legal tradition as a negative right opposes the communitarian ethic of French and Italian society, which demands affirmative duties from society. *Casey's* creation of positive duties for women to society, however, signifies a shift in the Court's traditional interpretation from individual rights as negative rights, including the right to be left alone, to individual rights that entail affirmative obligations to society, exemplified by the French and Ital-

248. *TRIBE, ABORTION, supra* note 2, at 208.

249. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (failing to mention any responsibility owed by community to pay for woman's abortion).

250. *See* Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, pt. 1, 1978 Gazz. Uff. 3642, 1978 Lex. 871; *see* *GLENDON, ABORTION, supra* note 16, at 53 (urging United States to fund abortion). "If the state is once again to restrict the availability of abortion and to affirm the value of unborn life, it should in all fairness strive to help those who bear and raise children, not only during pregnancy but also after childbirth." *Id.*

251. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980) (holding that Constitution does not entail affirmative obligations on federal government to provide abortion funding); *see also DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189, 202-03 (1989) (holding that Constitution's Due Process Clause does not impose any affirmative obligation on state government to provide individuals with certain minimal levels of safety and security); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.) (holding that Constitution is a "charter of negative rather than positive liberties"), *cert. denied*, 465 U.S. 1049 (1983).

252. *Warren & Brandeis, supra* note 1, at 198.

253. *Leslie Francis, Virtue and the American Family*, 102 *HARV. L. REV.* 469, 486 (1988) (reviewing *GLENDON, ABORTION, supra* note 16).

ian abortion legislation.²⁵⁴ Although the U.S. Supreme Court has held that the Constitution does not confer upon individuals an affirmative right to government aid,²⁵⁵ *Casey* permits states to construct affirmative duties for women contemplating abortion.²⁵⁶

In short, if U.S. abortion law completes its movement from taking individual rights seriously to taking individual responsibilities seriously, the United States must also move, to some extent, from the view of the government as limited only by negative liberties to a view of the government as having affirmative obligations to fund the individual's responsible decision-making. Creating affirmative duties for citizens, such as requiring women to reflect upon their abortion decision, should entail the creation of reciprocal affirmative duties of the government.²⁵⁷ By this shift, the Court and legislatures must recognize the government's missing affirmative obligation to promote the woman's welfare in her abortion decision.

In order to attain genuine compromise on the abortion question, state legislatures must accompany imposing of community values on the woman's decision with providing public assistance. Funding the woman's decision, as the French and Italian legislation provide, simultaneously satisfies the community's call to responsibility and meaningfully secures the abortion decision for all women, both poor and wealthy.²⁵⁸ As evidenced by the French and Italian examples, compromise legislation can solve the abortion question aptly.²⁵⁹ Scholars calling for a legislative resolution of the abortion issue should also urge the community to accompany regulations mandating reflective decisions with public funding of the woman's ultimate decision.²⁶⁰ Ignoring the community's reciprocal respon-

254. See West, *supra* note 3, at 83 (arguing for civic responsibility).

255. See GLENDON, RIGHTS, *supra* note 3, at 99 (arguing that U.S. discourse misses language of responsibility).

256. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2816 (1992).

257. See GLENDON, RIGHTS, *supra* note 3, at 108 (urging community to provide financial support for citizens and infuse U.S. tradition with missing dimension of responsibility for individual and state).

258. See Law No. 75-17, Jan. 18, 1975, 1975 J.O. 739, 1975 D.S.L. 154, amended by Law No. 79-1204, Jan. 1, 1980, 1980 J.O. 3, 1980 D.S.L. 71; Law No. 140, pt. 1, 1978 Gazz. Uff. 3246, 1978 Lex. 871.

259. Ely, *Wages*, *supra* note 97, at 943 (arguing that abortion question should be dealt with by legislatures, not Court).

260. See *supra* notes 101-18 and accompanying text (discussing movement in

sibility to the woman effectively vitiates the poor woman's right to terminate her pregnancy.

CONCLUSION

In order to take responsibility seriously regarding the abortion question, the U.S. Supreme Court and state and federal legislatures should recognize the community's responsibility to care for the pregnant woman's choice. Upholding community values means accepting common responsibility.²⁶¹ The government's briefs in *Webster* lauding the Western European compromise poignantly resound of irony, if not hypocrisy. The government supported the denial of public funding for abortions while the Western European experience demands such community responsibility to fund the woman's abortion counseling and her ultimate decision.²⁶² In light of the woman's newly enunciated duty to bear in mind her community's interests in her choice, the refusal to fund abortions publicly in the United States not only precludes a woman's meaningful exercise of her fundamental right but denies the community's reciprocal responsibility to the woman. Permitting abortions in the absence of public funding merely subordinates the woman and treats her unwanted pregnancy as a deviant event.²⁶³ Accordingly, the woman's choice is not supported by the community but instead is denied its deserved efficacy.

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scholarly community to bring ultimate decision concerning abortion back to legislature).

261. See Frank Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. QUARTERLY 659 (1979) (arguing for Court to recognize that the Fourteenth Amendment's Due Process Clause protects individual's right to receive minimal subsistence from government); see also Ruth Colker, *Feminism, Theology and Abortion: Towards Love, Compassion and Wisdom*, 77 CAL. L. REV. 1064 (1989) (urging Court to recognize duty owed to individuals to fund abortion).

262. Amicus Curiae Brief of the United States in Support of Appellant at 8, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (arguing that states may choose not to encourage or assist abortions in any respect).

263. DAVIS, *supra* note 40, at 210.

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